Supreme Court, U.S.
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No. 86-295

In the Supreme Court of the United States

October Term, 1986

COMMONWEALTH OF PENNSYLVANIA,
Respondent

vs.

WALTER T. SMITH,
Petitioner

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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QUESTION PRESENTED FOR REVIEW

Whether the Fourth and Fourteenth Amendments of the United States Constitution would require a Pennsylvania State Fire Marshal to obtain a search warrant to enter, search and seize evidence from a dwelling house significantly damaged by fire in the nighttime when such reentry was done in the early morning hours thereafter?

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CASES:

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New Jersey v. T.L.O., 469 U.S. , 105 S.Ct. , 83 L.Ed. 2d 720 (1985) 6

OPINIONS BELOW

The opinions below are as set forth in the Petition for Writ of Certiorari filed by the Petitioner prior hereto.

JURISDICTION

Jurisdiction is as set forth in the Petition for Writ of Certiorari filed by the Petitioner.

CONSTITUTIONAL PROVISIONS

The Constitutional provisions are as set forth in the Petition for Writ of Certiorari filed by the Petitioner.

COUNTER-STATEMENT OF THE CASE

On the evening of the 28th day of June, 1982, Raymond C. Cobb, Pennsylvania State Police, was on regular patrol when it came to his attention that the residence of Walter T. Smith, Borough of Great Bend, Susquehanna County, Pennsylvania, was on fire. He proceeded to the scene of the fire to assist in the direction of traffic. The house was engulfed in flames when he arrived. Trooper Cobb also serves as Fire Marshal for Susquehanna County. During the time he was at the scene, the Fire Chief suggested to him that the fire was of suspicious origin and that electric power to the burning house had been cut that day, so that there was no electric current in the house at the time the fire broke out. Trooper Cobb remained at the site until the fire was suppressed at 10:00 p.m. and did observe the building through open windows and doors, but did not enter. At that time he met co-owner, Sherry Lee Smith, and he advised her he would be investigating the premises later.

Officer Cobb left the State Police Barracks in Gibson, Pennsylvania at 9:00 a.m. the next day in his role as Fire Marshal, passing through the Borough of New Milford and the office of a Magistrate on his way to Great Bend. He did not obtain a search warrant. He entered the building at approximately 10:00 a.m., took pictures of burned patterns and collected samples. While Officer Cobb was in the building, the Defendant, co-owner Walter Smith, appeared and offered to assist Officer Cobb.

Counter-Statement of the Case

As a result of evidence obtained, the Defendant was charged with the following crimes: Arson, 3301 (b) (2) (3) and Risking Catastrophe, 18 C.S.A. 3302 (b).

Prior to trial Smith moved to suppress the photographs taken by Trooper Cobb and the samples obtained claiming his Fourth Amendment rights were violated.

The trial Court granted the Suppression Motion to which the Commonwealth appealed to the Superior Court of Pennsylvania.

That Court reversed the trial Court by a decision that found the search and seizure constitutional. This decision was appealed to the Supreme Court of Pennsylvania by the Defendants. The Supreme Court of Pennsylvania affirmed the decision of the Superior Court by a decision that found the search and seizure to be constitutional.

This appeal follows.

ARGUMENT

The issue raised in this appeal relates to the examination of a premises by a fire marshal which, under the decisions of *Michigan v. Tyler, et al.*, 436 U.S. 499, 92 S.Ct. 1941, 56 L.Ed. 2d 486 (1978) and *Michigan v. Clifford*, 104 S.Ct. 641, 78 L.Ed. 2d 477 (1984), involves considerations beyond those usually associated with the "ordinary" search and seizure case where the presence or absence of probable cause is most frequently litigated.

While all of the well known Fourth Amendment principles and doctrines developed over the years by this Honorable Court are applicable, see e.g. *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed. 2d 564 (1971) and the numerous cases cited therein, the term "exigent circumstances" as refined in *Tyler* and *Clifford*, supra, is of the greatest importance to "fire investigation" cases such as this case. "Exigent circumstances" is, in fact, the *only* realistic authority for any fire marshal to make any investigation of any recently burned building to investigate the causes and origin of a fire and, thereafter, prosecute an owner thereof for arson to defraud an insurance company or for risking a catastrophe.

Almost *never*, within a few hours of a fire, will sufficient information be known to sustain a finding of "probable cause" in support of an application for a search warrant. As such, if any fire marshal is going to be authorized to reenter a very recently burned structure without violating the owner's rights under the Fourth Amendment, such reentry must be under "exigent circumstances" in order to meet the Fourth Amendment standards.

Argument

From the above, it is submitted that the question raised before this Court by the Petitioner goes directly to the adequacy of the definition of "exigent circumstances" as previously set down by this Honorable Court in the cases of *Michigan v. Tyler*, supra, and *Michigan v. Clifford*, supra.

In the context of a fire investigation, the criterion has been stated as:

> "... [O]fficials need no warrant to remain in a building for a reasonable time to investigate the cause of a blaze after it has been extinguished. And if the warrantless entry to put out the fire and determine its cause is constitutional, the warrantless seizure of evidence while inspecting the premises for these purposes also is constitutional."

Tyler, supra, 436 U.S. 510, 98 S.Ct. 1950. As to the length of the reasonable time after a *nighttime* blaze is extinguished (such as the one in the present matter), the Supreme Court in *Michigan v. Tyler*, supra, found the "next morning" sufficient to be a continuation as opposed to a separate search. The *Clifford* decision later defined the "end" of the continuation criteria by finding a search by a *different investigator the next afternoon* without notice of intent to investigate to be beyond the definition of a continuation of the initial exigent circumstance.

It is respectfully submitted that, in these two decisions, the Supreme Court set down a definition of the circumstances under which exigent circumstances do and do not exist in language amply clear to allow for its application by the various Courts relying thereupon for guidance as the present case demonstrates and needs no further consideration by this Court at this time.

Argument

It is further submitted that the Pennsylvania Supreme Court's application of this Court's definition of "exigent circumstances" in the case now before this Court was totally consistent therewith and should not be disturbed.

"Reasonable Suspicion Is NOT Probable Cause"

Appellant relies heavily upon the fact that the Fire Marshal drove past the Magistrate's Office on his way to conduct his investigation and "could have" obtained a search warrant. As is well known, no search warrant can issue absent *probable cause*. The high water mark of the Fire Marshal's knowledge here constituted "probable *suspicion*". As such, he could never have obtained a search warrant under the historic interpretations of the Fourth Amendment known to even the most casual student of the Constitution. Certainly the Petitioner does not seek a ruling by this Court that extends the "reasonable suspicion" doctrine of *New Jersey v. T.L.O.* 469 U.S. , 105 S.Ct. , 83 L.Ed. 2d 720 (1985) to private dwellings even when to do so would assist law enforcement authorities in their efforts to investigate and prosecute those who would intentionally burn their own structures to defraud insurance companies at great danger to innocent human life and other property.

No "Racing Event" Is Created

Petitioner further argues that the present criteria as established by the Supreme Court of the United States

create a situation where a "race" to a structure recently destroyed by fire is created between the fire marshal and the owner. This argument can be answered in several ways. In the first place, the "swing decision" of Mr. Justice Stevens, in the *Clifford* decision, supra, pointed out at least four different places that prior notice of the intent to examine the premises was part of the criteria for a lawful reentry by a fire marshal. Such prior notice of intent to reenter is hardly the usual manner of conducting a "race" as the term is urged by the Petitioner here. Note that in this case prior notice was given to the co-owner of the home even while the fire still burned.

Further, under the criteria established, the Fire Marshal's reentry must be as soon as humanly feasible to be constitutional. Note that in *Tyler* a reentry in the early morning after a nighttime fire was valid, while in *Clifford* a search in the very early afternoon of the day after a nighttime fire was not constitutional, even though the fire marshal "won" whatever "race" had been conducted.

Maybe some critic of the criterion can argue that it creates a "race" of some kind. However, where the fire marshal is limited by the severity of the fire in the first place, and the very limiting criteria of *Clifford* in the second (maybe 6 hours after daybreak), and is required to give prior notice to the landowner before he even starts, the situation can hardly be described as the type of "race" that would suggest that the fire marshal is taking any unfair or unconstitutional advantage of the situation.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Petition for a Writ of Certiorari in the above captioned matter should be denied.

Respectfully submitted,

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